

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BRUD ROSSMANN,  
Plaintiff,  
v.  
RAY LETTEER,  
Defendant.

Case No. [15-cv-05680-MEJ](#)

**ORDER FOR CLERK OF COURT TO  
REASSIGN CASE  
REPORT & RECOMMENDATION**

**INTRODUCTION**

On December 10, 2015, Plaintiff Brud Rossmann filed the above-captioned case, as well as an Application to Proceed In Forma Pauperis. Dkt. No. 1. As the Application contained discrepancies, the Court ordered Plaintiff to file a declaration by December 30, 2015, explaining: (1) how he pays his monthly expenses, including the amount received for any source of income; (2) whether he is married and, if so, his spouse's monthly salary; (3) whether he has a bank account and, if so, the present balance; and (4) whether the complaint raises claims that have been presented in other lawsuits. Dkt. No. 5. Plaintiff failed to respond. Accordingly, the Court ordered Plaintiff to show cause by January 19, 2016, why this case should not be dismissed for failure to prosecute and failure to comply with court deadlines. Dkt. No. 6. The Court provided notice to Plaintiff that it may dismiss the case if he failed to respond by the deadline. As of the date of this Order, Plaintiff failed to respond to either the request for clarification or the Order to Show Cause. Based on this procedural history, the Court finds it appropriate to dismiss this case pursuant to Federal Rule of Civil Procedure 41(b).

## LEGAL STANDARD

Under Rule 41(b), “the district court may dismiss an action for failure to comply with any order of the court.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992); *see also Oliva v. Sullivan*, 958 F.2d 272, 273-74 (9th Cir. 1992) (district court may dismiss sua sponte for failure to meet court deadline). “[T]he district court must weigh the following factors in determining whether a Rule 41(b) dismissal is warranted: ‘(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.’” *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). The *Henderson* factors “are ‘not a series of conditions precedent before the judge can do anything,’ but a ‘way for a district judge to think about what to do.’” *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. (In re PPA)*, 460 F.3d 1217, 1226 (9th Cir. 2006) (quoting *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998)). Dismissal is appropriate “where at least four factors support dismissal . . . or where at least three factors ‘strongly’ support dismissal.” *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998).

## DISCUSSION

The first two *Henderson* factors strongly support dismissal. First, “the public’s interest in expeditious resolution of litigation always favors dismissal.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). Second, the Court’s need to manage its docket also weighs in favor of dismissal. Plaintiff delayed adjudication of the claims in this case by failing to respond to the Court’s request for clarification and show cause order. Non-compliance with procedural rules and the Court’s orders wastes “valuable time that [the Court] could have devoted to other . . . criminal and civil cases on its docket.” *Ferdik*, 963 F.2d at 1261.

As for the third *Henderson* factor, the mere pendency of a lawsuit cannot constitute sufficient prejudice to require dismissal. *Yourish*, 191 F.3d at 991. However, “prejudice . . . may . . . consist of costs or burdens of litigation.” *In re PPA*, 460 F.3d at 1228. Moreover, “a presumption of prejudice arises from a plaintiff’s unexplained failure to prosecute.” *Laurino v.*

1 *Syringa Gen. Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002). A plaintiff has the burden of  
2 demonstrating a non-frivolous reason for failing to meet a court deadline. *Id.*; *see also Yourish*,  
3 191 F.3d at 991. Here, Plaintiff failed to respond to the Court's request for clarification and Order  
4 to Show Cause. Therefore, the Court concludes the third *Henderson* factor also supports  
5 dismissal.

6 The fourth *Henderson* factor, that public policy favors disposition of cases on their merits,  
7 normally weighs strongly against dismissal. *See, e.g., Hernandez*, 138 F.3d at 399. "At the same  
8 time, a case that is stalled or unreasonably delayed by a party's failure to comply with deadlines . .  
9 . cannot move forward toward resolution on the merits." *In re PPA*, 460 F.3d at 1228. The Ninth  
10 Circuit has "recognized that this factor 'lends little support' to a party whose responsibility it is to  
11 move a case toward disposition on the merits but whose conduct impedes progress in that  
12 direction." *Id.* (quoting *In re Exxon Valdez*, 102 F.3d 429, 433 (9th Cir. 1996)). Thus, if the  
13 fourth *Henderson* factor weighs against dismissal here, it does so weakly.

14 Finally, the Court has already attempted less drastic sanctions, without success, and  
15 therefore determines that trying them again would be inadequate or inappropriate. "Though there  
16 are a wide variety of sanctions short of dismissal available, the district court need not exhaust  
17 them all before finally dismissing a case." *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 674  
18 (9th Cir. 1981). Here, the Court already attempted the lesser sanction of issuing an Order to Show  
19 Cause and giving Plaintiff an opportunity to explain the failure to respond to the request for  
20 clarification. As Plaintiff failed to respond, another order requiring Plaintiff to respond is likely to  
21 be futile. *See, e.g., Gleason v. World Sav. Bank, FSB*, 2013 WL 3927799, at \*2 (N.D. Cal. July  
22 26, 2013) (finding dismissal under Rule 41(b) appropriate where the court previously attempted  
23 the lesser sanction of issuing an Order to Show Cause and giving the plaintiff an additional  
24 opportunity to re-plead). Further, the Order to Show Cause warned Plaintiff of the risk of  
25 dismissal; thus Plaintiff cannot maintain the Court failed in its "obligation to warn the plaintiff that  
26 dismissal is imminent." *Oliva*, 958 F.2d at 274. Accordingly, the Court finds the fifth factor also  
27 weighs in favor of dismissal.  
28

**CONCLUSION**

Based on the analysis above, the Court finds at least four of the five *Henderson* factors weigh in favor of dismissal. Plaintiff failed to respond to the Court's request for clarification and order to show cause. Thus, Plaintiff failed to prosecute this case and dismissal is appropriate. However, a less drastic alternative is to dismiss without prejudice. *See Ferdik*, 963 F.2d at 1262. Dismissal will minimize prejudice to Defendant, but dismissing the case without prejudice will preserve the ability of Plaintiff to seek relief. Thus, "[i]n an abundance—perhaps overabundance—of caution," the Court finds dismissal without prejudice is appropriate. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1021 (9th Cir. 2013) (remanding to the district court in order to consider whether dismissal should have been without prejudice).

Accordingly, because Plaintiff did not yet consent to the undersigned's jurisdiction, the Court hereby ORDERS the Clerk of Court to reassign this case to a district court judge. The undersigned RECOMMENDS the newly-assigned judge DISMISS this case WITHOUT PREJUDICE for failure to prosecute and failure to comply with the Court's deadlines and orders.

Pursuant to Federal Rule of Civil Procedure 72, any party may serve and file objections to this Report and Recommendation within 14 days after being served.

**IT IS SO ORDERED AND RECOMMENDED.**

Dated: January 22, 2016



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MARIA-ELENA JAMES  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BRUD ROSSMANN,  
Plaintiff,

v.

RAY LETTEER,  
Defendant.

Case No. [15-cv-05680-MEJ](#)

**CERTIFICATE OF SERVICE**


I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 22, 2016, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Brud Rossmann  
C/O Sawtooth Capital LLC  
Ashton San Francisco  
301 Executive Park Boulevard  
San Francisco, CA 94134

Dated: January 22, 2016

Richard W. Wieking  
Clerk, United States District Court

By:   
Chris Nathan, Deputy Clerk to the  
Honorable MARIA-ELENA JAMES

United States District Court  
Northern District of California